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equity substituted. But even if the courts do not care to go the whole length of restraining the sale when the land is claimed by one other than the debtor, and the title is in dispute, there is no reason why the rule enjoining the sale of a wife's lands, seized on an execution against her husband, but to which she has fully established her title, should not be extended to cases where a stranger to the defendant in the execution fully establishes his rights in the land levied on, and seeks to prevent his land from being sold to satisfy a debt not his own.

CAN A CORPORATION EXIST WITHOUT STOCKHOLDERS?

In general there may be said to be two theories concerning the nature of a corporation. (1) That it is a legal entity distinct from the members who compose it, or (2) that it is a collection or association of natural persons formed for certain legal purposes.

Under the second theory the very definition makes stockholders necessary for corporate existence.

Under the first theory when the legal or artificial person is spoken of, it is simply because the corporation is looked at from one point of view, that is viewing one result of incorporation. To argue that as a result of incorporation there is an entity formed, and then to say that the entity can exist without the component parts of which it is made up would be clearly a fallacy.

A corporation is but an association and it would be a contradiction in terms to speak of an association existing without associates composing it.¹

In the recent case of *In re Western Branch v. Trust Company*,² the stockholders of the Western Bank unanimously agreed to increase their capital stock from \$200,000 to \$500,000. On the same day the board of directors took the necessary steps looking to the subscription for an issuance of this stock. All the original shares of stock were retired and there were issued in their stead new shares. There intervened a short period of time between the retirement of the old issue and the issuing of the new.

It was contended by creditors who sought to have the Bank declared a partnership and the members bankrupt, that during this interval there were no stockholders and consequently the corporation came to an end.

¹ I Morawetz, Private Corporations, 33.

A statute in the jurisdiction provides, that a corporation shall exist from the moment that the certificate of incorporation is filed with the Secretary of State.

The Court says: "The City Bank of Sherman [the name under which the Western Bank became incorporated] as a corporation was brought into existence by the granting of its charter. Its charter was a franchise right to be exercised by those entitled under the law to exercise it. It existed before there were stockholders so that its existence does not depend upon the existence of technical stockholders."

From the report of the case it is not clear what acts were performed when the old stock was retired and the new stock issued. But there does not seem to be any reason why if all the stockholders agreed to retire their stock with intent that it should be re-issued, they thereby ceased to be stockholders.

One or more of the stockholders, it is conceivable, could surrender their rights in the corporate property to the corporation³ taking in return merely a promise from the corporation to issue to them at a certain date in the future new shares. In this interval those who surrendered their stock would not have rights which they could enforce against the corporation property either at law or in equity. In this case the persons surrendering their property rights would have given them up to the other stockholders. But if all the stockholders unanimously gave up their rights, taking merely a promise in return, the question arises as to who is now the owner of the corporate property. Surely the answer must be that the associates have not in reality given up their property rights at all. Their certificates of stock may have been destroyed, but they would still be stockholders in the sense that they each had property rights in the corporation property.⁴

But let us assume, as the Court appears to have done, that there were in fact no stockholders during the interval.

The statute in the jurisdiction provides that "the existence of the corporation shall date from the filing of the charter in the office of the Secretary of State." Therefore in some sense it must be admitted that the corporation existed prior to the existence of stockholders. But this existence could only be in name.⁵

It has been held that the acts of the signers of the certificate of incorporation done in the corporate name, have bound the

² 163 Federal Rep. 713.

³ Taylor, Priv. Corp. 136.

⁴ *Cattle Co. v. Burns*, 82 Texas, 56.

⁵ I Morawetz, 33.

corporation when later fully organized. Such a corporation has been held to be capable of holding property,⁶ and capable of issuing promissory notes.⁷ But on the other hand not capable of being a party to a contract.⁸

The principal case then holds that the existence of a corporation in name alone is sufficient to keep that corporation alive during an interval between the retirement of old stock and the issuance of new, when in that interval there are no stockholders.

IS A COMMUNICATION BY A COMMERCIAL AGENCY PRIVILEGED?

The question as to the liability of a mercantile agency for libel in case of an honest though erroneous expression of opinion was raised in the recent case *Mackintosh v. Dunn*, L. R. (1908) App. Cas. 390. An action was brought against the defendant and others who conducted a commercial agency for damages resulting from the publication of two libels which concerned the plaintiffs in respect to their business. The defendant's business was the usual one of commercial agencies, that of obtaining information with reference to the commercial standing and position of persons and of communicating such information confidentially to subscribers to the agency in response to specific and confidential inquiries. The single question presented to the court was whether the occasion on which the admitted libels were published was or was not a privileged one. The House of Lords held the occasion not a privileged one although no carelessness or ill faith was alleged on the part of the defendant company. The Court cited the opinion of Parke, B., in the case of *Toogood v. Spyring*¹ as the settled law in regard to the publication of information injurious to the character or business of another: "The law considers such publications as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice. If fairly warranted by any occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society." The Court holds that the underlying principle is "the common

⁶ *Coyote v. Ruble*, 8 Ore. 284, 293.

⁷ *National Bank v. Texas Co.*, 74 Tex. 421, 435.

⁸ *Aspen W. & L. Co. v. Aspen*, 5 Colo. App. 12, 18.

¹ 1 C. M. & R. 181.